(Findings VII and VIII, Rec., 196, 197.) Whereupon Gage sold to Greene "upon better terms than anybody else had ever offered" (Finding VIII, Rec., 197), after consulting the directors and a large majority of the stockholders, who urged him to make the sale. The sale and contract represented the entire capital stock, including Hallenborg's 8,000 shares, except that owned by Greene and his associates and about 6,500 shares owned by other parties. The said stockholders accepted and ratified the contract and sale, except Hallenborg, who exercised the right reserved for him in the contract of sale by Gage, and declined to be bound thereby. (Finding VIII, Rec., 199.)

2. Hallenborg's refusal to accept the contract was *solely* because of his claim that *he* held a prior option from Gage for the *same* stock.

(*Letter Hallenborg to Gage, Rec., 110.*)

3. The price paid and accepted under the sale to Greene was $2.50 per share and payment by the latter of the company's indebtedness, including counsel fees, amounting to $135,000, which was so paid by Greene, Gage being also paid $50,000 "as compensation to him for the time, labor, trouble and attention given to said company's business, and for money advanced to and for said company, and expenses paid in attending to the affairs of said company, and in connection therewith." (Finding IX. Rec., 198, 199.)

4. The good faith of the entire transaction on the part of Gage is expressly found. (Finding VIII. Rec., 198.)

I.

Of the 200,000 shares of stock involved, no holders complain, except Hallenborg, with 8,000 shares, and the intervenor, Addicks, with 5,000 shares. All the rest of the shareholders whose stock was thus sold by Gage received the full par value of $2.50 per share; the money to pay the company's debts was also furnished and the compensation paid Gage stands without complaint from a single shareholder, except Hallenborg and Addicks. They represent less than seven per cent. of the entire holdings of capital stock.

The company's sole asset was an expensive litigation which the company's counsel advised Gage could not be successfully maintained. (Finding VIII, Rec., 198). Failure therein meant loss of all value in the capital stock and the burden of an unpaid indebtedness, then amounting to $135,000, with no assets or resources of the company for its payment.

II.

The primary and controlling point is, that Gage was acting as *agent* for these stockholders. All ratified and approved his action except these two plaintiffs; they accepted the payment secured by him for their stock and were relieved of all liability for the then large indebtedness of the company.

It was not a sale of the company's *property*, but of *control* of the corporation. That as part of the sale, it was agreed Gage and the then directors should resign and others among the new owners of the capital stock should

be substituted in their place, was in no possible view inequitable or improper. That is a matter of common occurrence. Gage and all other then directors had sold their entire holdings; they were not competent to remain as directors because not stockholders, while the new stockholders had the right to so replace them.

Authority is not needed for so plain a proposition, but Mr. Thompson, in his Commentaries on the Law of Corporations—Sec. 5371, Vol. 4, foot page 4082—fully and clearly sets forth this plain right, and its plain consequences in thus transferring corporate control where it is not made in fraud of the rights of creditors.

The same author, Sec. 2300, Vol. 2, foot page 1703, observes:

> "The *jus disponendi* being an incident of the ownership of property, the general rule (subject to exceptions hereafter pointed out and discussed) is that every owner of corporate shares has the same uncontrollable right to alien them which attaches to the ownership of any other species of property. The correlative right to purchase corporate shares rests upon similar grounds; the right to become the possessor, by lawful means, of this species of property is as clear a right as the right so to become the possessor of any other species of property, nor can the *motive* influencing the party who makes such a purchase become the subject of a judicial inquiry, where the motive is not in itself unlawful. *Accordingly, it has been held that parties who are interested in opposition to a corporation have the right to purchase its stock in order to defeat a contract which it is about to make.*"

Manifestly the individual stockholders for whom Gage acted and who *ratified* his action, could have individually sold their stock to the same purchaser. Indeed, they threatened so to do. (Testimony Gage, Rec., 77, 78.) Because Gage did the same thing *collectively* for them, and the control of the corporation thereby passed into the same purchaser's hands, can not change the lawful character of the transaction.

III.

With the control of the corporation it was hence natural that in the exercise of lawful right the new purchasers should seek to dismiss all pending litigation. In other words, as admittedly the sole asset of the Cobre Grande Company was litigation, the owners of the company had the right to *stop* the litigation. Holders of some 185,000 shares, or more, of the entire 200,000 shares of capital stock, so desired and so acted. Plaintiffs owning less than seven per cent. of the capital stock here complain that such action was fraudulent and unlawful. Why? All creditors of the company were fully protected because the Company's indebtedness had been provided for. Manifestly such an insignificant minority could not successfully *vote* to carry on the litigation with its attendant heavy expense. The legal result may have been to practically close up the company's business, but that result may lawfully come from the vote of the majority in respect of private corporations performing no public duty. Mr. Thompson, in section 6686, Vol. 5, foot page 528, aptly observes:

treasury of the company in pursuance of the contract of December 12. And finally the court finds "that the temporary restraining order granted in this action, enjoining defendants from carrying out the terms and provisions of the contract of December 12, 1900, and dismissing any and all of the actions then pending in behalf of the Cobre Grande and enjoining defendant Phœnix National Bank from delivering up any of the papers and documents held by it in escrow, evidencing the title held by the Cobre Grande Copper Company in and to the mining property described in the complaint, was modified, and the part of it enjoining the Phœnix National Bank was dissolved upon the ground that the District Court in and for Maricopa County had rendered its decision in the suit of the Cobre Grande Copper Company against Greene and others adversely to said Cobre Grande Copper Company, and that as a part of the judgment of said court the Phœnix National Bank was commanded to deliver up said papers and documents to said defendant Greene, and that as this case now stands there is nothing before the court except an application for the appointment of a receiver."

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the Court.

Both of the lower courts held that the suit had become one for the appointment of a receiver. The Supreme Court said: "The purposes for which a receiver is asked is twofold so far as the record is concerned: First, that he may take charge of the property of the company; second, that he may prosecute its litigation." After some comment the court further observed that the District Court was well within the exercise of a sound discretion in refusing to appoint a receiver, and "that there was not any other relief which the court could properly grant the plaintiffs in the action." We do not find it necessary to decide whether, if plaintiffs' complaint were true, they would not be entitled to greater relief than the appointment of a receiver. We rest our judgment on the merits. In other words, we think the complaint has not been established.

The complaint charges a conspiracy betweeen Greene and Mitchell, being at the time directors of the Cobre Company, to deprive the company of its mines and property and acquire it for themselves, and that in pursuance of the conspiracy they took possession of the company's property. No evidence was offered in the present suit to sustain the charge. Records of suits in which like charges were made cannot be regarded as such. The complaint also charges the contract of December 12, 1900, to be a "fraudulent and corrupt contract and conspiracy of Greene with Gage and other directors of the Cobre Company, to stop the litigation against defendants and to secure to them the undisputed possession of the mines"

from which the Cobre Company had been evicted. Both of the lower courts found against the charge. They found that Gage entered into the contract with the knowledge of the directors of the Cobre Company, and in good faith, upon the advice of counsel of the futility of further pursuing the litigation against Greene and in the belief that "the contract was to the best interest of said company and its stockholders." It may be admitted that Greene's purpose was to stop the litigation against him and quiet his possession of the property, but we cannot assume from this that he was guilty of fraud in making the contract of December 12, or that it was part of a conspiracy with the directors of the Cobre Company to deprive the company of its property. Therefore any fraud in fact is out of the case.

Plaintiffs, however, contend that the contract is fraudulent on its face, and that it was decided so to be by the Supreme Court of New York in *Hallenborg* v. *Greene*, (66 App. Div. Rep. 590.) The pleadings are not set out in the report of the case. We may assume, however, that the complaint was in most part as that in the case at bar.

The case went to the Supreme Court on an appeal from an order granting a preliminary injunction and appointing a receiver. It was heard on the complaint and affidavits of the plaintiff. The affidavits of the defendants were by stipulation omitted from the record. Upon the showing thus made the court said:

"According to the complaint and affidavits the Cobre Company was not only a solvent corporation, but its assets were exceedingly valuable, and through conspiracy, fraud and bribery the defendants Greene and Mitchell have obtained the management and control thereof to further their own scheme in hostility to the interests of the other stockholders, and have actually obtained a contract from the Cobre Company to transfer to these rival companies, controlled and managed by Greene and Mitchell, all its property and property rights, without even a nominal consideration. This fraudulent contract was being consummated with dispatch at the time of the commencement of this action and the granting of the injunction herein. These allegations must be taken as true for the purposes of this appeal, and it is evident that the inevitable consequence will be, not only that the stock of the Cobre Company, of which the plaintiff is a large holder—owning one-twenty-fifth of the entire capital stock—will be rendered worthless, but that there will be no assets with which to pay the claims of creditors, of whom also the plaintiff is one for a substantial amount.

"It needs no refinement of the decisions to show that the cause thus presented is one for equitable cognizance."

The allegations of the plaintiffs were taken to be true, and being so taken the comments of the court may claim justification. In the case at bar the allegations of the complaint, as far as they are passed on, are found to be untrue. The opinion of the Supreme Court of New York, therefore, is of no value to plaintiffs' contention.

We are remitted, therefore, to the contract of December 12. What fraudulent element is there in that? It disposed of the shares of the stock-

holders and it secured the payment of money to the corporation; it settled controversies which, as far as appears, the company had no means of prosecuting, and which, wherever they were tried, had been decided against the company, and where not decided, in the opinion of the company's attorney, would also be decided against the company. We may assume that the stockholders knew or could estimate the value of the properties. They deposited their stock with Gage to sell, became indeed impatient at his delay. We may assume the price of the stock reflected the value of the properties—Hallenborg bought his shares at $2.50. He had an option upon all that were in Gage's hands at that price. He let the option lapse, although negotiation was kept up with him from October to December. Gage then turned to Greene, who, it is found, offered to purchase the stock on better terms than anybody else ever offered. And there was no concealment. Gage was urged by the directors of the company and a large majority of the stockholders to make the contract. It was subsequently formally ratified by the directors and by a majority vote of the stockholders at a stockholders' meeting.

But there were three other elements from which plaintiffs deduce fraud. Gage was given $50,000, as compensation as president of the Cobre Company and other services and expenses paid by him; the attorneys of the company were paid $50,000, for legal services, and there was surrendered to Costello the note which he owed the company. There was no secrecy about these items, and it is manifest from the findings and the evidence that they constituted no inducement to the contract. Whether Gage can be compelled to pay to the Cobre Company the money received by him we need not decide. Its receipt by him did not make the whole contract fraudulent. It did not take from the stockholders the power to sell their stock, nor from the directors of the company the power to control the litigation in which the company was involved, to abandon that litigation or to compromise it. In the exercise of their power they could have done those things directly. It was a matter of form and procedure that it was done in the manner provided by the contract of December 12.

It is deceptive to call or regard the action of the directors as a transfer of the property of the corporation without consideration or for an inadequate consideration. The company had only a right to purchase the property, the conditions of which it had not fulfilled. It claimed legal excuse and brought suits against Greene, but that it had legal excuse was disputed, and seems to have been doubted by all who were interested in the property but the plaintiffs. A jury in Texas had decided against the excuse; and the court in Arizona has also done so. That the latter was subsequent to the contract of December 12 does not militate against it as proof of good faith of the settlement.

This view of the merits of the case renders it unnecessary to pass upon the contention of the defendants that a court of equity has no inherent power, in the absence of statutory authority, to appoint a receiver upon the application of a private person under the circumstances presented by the complaint.

There are assignments of error upon the rulings of the trial court on the admissions of testimony, oral and documentary, which we do not think call for discussion. It is enough to say that they are not well taken.

There is also an assignment of error upon the refusal of the Supreme Court to make certain findings of fact. We think the findings made substantially cover those proposed, certainly to the extent necessary to the case as we have considered it.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No 87.—October Term, 1905.

Axel W. Hallenborg and J. Edward Addicks, Appellants,
vs.
Cobre Grande Copper Company, E. B. Gage, W. M. Adamson, John H. Costello, J. Henry Wood, and Con. O'Keefe, its Directors; William C. Greene, George Mitchell, Phœnix National Bank of Phœnix, Arizona Territory; Cananea Consolidated Copper Company, and Greene Consolidated Copper Company.

Appeal from the Supreme Court of the Territory of Arizona.

[January 8, 1906.]

This is a minority stockholder's suit. It was brought originally by Axel W. Hallenborg as owner of 8,617 shares of the Cobre Grande Copper Company, an Arizona corporation, and also as creditor of that corporation, for advances to the amount of $50,005. The appellant Addicks owned 5,000 shares and was allowed to intervene at the trial, and adopted Hallenborg's complaint.

In November, 1898, defendant (appellee) Greene owned certain mining properties in Sonora, Mexico, and had an option on other properties. He gave an option on these properties to defendant Mitchell. It was provided in the option that $12,500 should be paid in cash and $237,500, as follows: $37,500 on before November 26, 1899; $100,000 on or before November 26, 1900; $100,000 on or before November 26, 1901. In April, 1899, Greene, Mitchell and other parties, under the laws of Arizona, organized the Cobre Company. One hundred and ninety-nine thousand nine hundred and ninety-five shares of the stock were turned over to Mitchell in consideration of his option from Greene, which option was assigned to the Cobre Company subject to Greene's rights. The Cobre Company went into possession and was in possession in September, 1899. In October of that year controversies arose between Greene and the company over the option and the right to possession of the properties, and Greene entered into possession of them. Thereupon the company instituted suits in the courts of Mexico to gain possession of the properties, and also instituted a suit in the District Court of Maricopa County, Arizona, to restrain the delivery to Greene of the deeds which were put in escrow under the contract with Mitchell, which had been assigned to the Cobre Company. In the latter suit an injunction was granted restraining Greene from demanding or re-

ceiving the deeds. A suit was also brought in New York and one in Texas to recover the product of the mines. In the suit in Arizona the Cobre Company alleged, among other things, in substance, all the facts set forth in paragraph three of the original complaint in the present suit, and prayed that Greene be required to account for the proceeds of the products of the mines and other property alleged to have been appropriated by him. Issue was joined by the defendants therein, the case tried and a judgment entered dismissing the complaint. The judgment was not appealed from. At the time of the judgment the plaintiffs were stockholders of the Cobre Company.

While the litigation was pending the stockholders of the Cobre Company, or a majority of them, comprising stockholders to the number of 115,049 shares, entered into a pooling arrangement, whereby all of their stock was delivered to defendant Gage, with power to vote the same at all meetings of the stockholders. Subsequently Gage was granted the right to dispose of and sell the stock at his discretion. Several attempts were made by Gage to sell the stock at $2.50 a share, which failed on account of the other contracting parties not complying with their contracts. The plaintiff Hallenborg and John H. Costello opened negotiations with Gage for the stock at $2.50 a share. This also failed on account of objection by Costello to the contract which was drawn, although negotiations were kept up until December, 1900. Then Gage opened negotiations with Greene, who offered to buy the stock, upon better terms than anybody else had offered. Gage consulted the directors and they urged him to enter into a contract with Greene. The stock represented by Gage represented the entire stock of the company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates and about 6,500 shares owned by other parties. Gage entered into a contract with Greene, December 12, 1900, and it was ratified in its entirety by the directors and by a majority vote of the stockholders. Hallenborg was present by attorney at the meeting and protested against the ratification. The contract was complied with by Greene and he paid the full purchase price for the shares, and they were delivered to him and the Greene Copper Company. All of the stockholders accepted the money so paid except Hallenborg, who returned the money sent to him and declined to be bound by the contract.

The court finds that the contract was made with Greene in good faith, with full knowledge and consent of the directors and upon the advice of counsel of the Cobre Company, that the company could not successfully maintain the suit brought in Arizona, and with the full belief on the part of Gage that the contract was for the best interest of the company and its stockholders. And the court further finds that no agreement was made between Gage or other persons, whereby the directors, Adamson, Wood,

O'Keefe, or any of them, were to derive benefit or did derive any benefit whatsoever, except such as they derived from the sale of their stock.

The contract of December 12, between Gage and Greene, provided for the payment of the stock in certain instalments. Greene was to pay to Gage $25,000 in cash in addition to the $2.50 per share, and also pay to Gage $30,000, and in addition 3,000 shares of the capital stock of the Greene Consolidated Copper Company, or, in lieu thereof, $30,000 in cash. Gage was given the privilege of taking, instead of $2.50 per share for shares of stock in the Cobre Company, stock in the Greene Consolidated Copper Company—four of the former for one of the latter—the option to be exercised before payment of the second instalment on the stock of the Combre Company. Five thousand shares of the Greene Consolidated Copper Company were provided to be paid to Gage for his own use and benefit, and 5,000 shares for the use and benefit of L. H. Chalmers, Baker & Bennett, and Herndon & Norris, attorneys at law in Arizona.

It was also agreed that a certain promissory note given by J. H. Costello to the Cobre Company, amounting to $23,000, was to be surrendered to Costello. This note was conditioned upon the Cobre Company obtaining possession of its property in Mexico, and was not to be paid until ninety days after such recovery. It was also agreed that the suits brought by the Cobre Company in New York, Texas, and Arizona should be dismissed. The other provisions of the contract are but incident to those before given and may be omitted. The suits in New York are still pending. All the other suits were dismissed or otherwise disposed of by final judgment prior to this suit. The $25,000 mentioned in the contract of December 12 was for the purpose of taking up and discharging certain notes due by the Cobre Company. It was so paid. The $30,000 mentioned was to be and it was turned into the treasury of the company to pay its debts. The 3,000 shares in the Greene Consolidated Company, or the alternative $30,000, was also for the purpose of paying the debts of the Cobre Company outside of the $25,000 before mentioned. It was paid into the treasury. The 5,000 shares of stock in the Greene Consolidated Company was intended by all parties as compensation to Gage as president of the Cobre Company, and for the time, labor and trouble given to the company's business, and for money advanced for it and expenses paid in attending to its affairs. Instead of shares, as provided, a cash payment of $50,000 was made to him. The share paid to Chalmers and Baker & Bennett, Herndon & Norris were intended to be paid as compensation as attorneys for the company for their services in various litigations. Instead of the shares a cash payment of $50,000 was made, and it is found that their services were reasonably worth that sum. The note against Costello was surrendered to him.

The court also finds that the only property in possession of the Cobre Company within the jurisdiction of the court is the money paid into the